92-167

Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

Case No.

IN THE

Supreme Court Of The United States

October Term, 1992

GARY WAYNE FOWLER,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Petitioner is entitled to a two-level reduction in his sentence for "acceptance of responsibility" as set forth in U.S. Sentencing Guidelines (hereinafter "U.S.S.G.") § 3E1.1, in light of his unconditional guilty plea and his cooperation with federal authorities.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
A. Dispositions and Proceedings Below	1
B. Basis for Jurisdiction	1
C. Statement of the Facts	1
D. District Court Jurisdiction	2
E. Basis for Writ of Certiorari	2
CONCLUSION	3
CERTIFICATE OF SERVICE	4
APPENDIX	A-1
A. Opinion of the 11th Circuit	A-1
B. Judgment in a Criminal Case — United States District Court for the Northern District of Alabama	A-3
C. Transcript of Plea	A-10
D. Transcript of Sentencing	A-32

STATEMENT OF THE CASE

A. Dispositions and Proceedings Below

The Honorable Edwin L. Nelson, United States District Judge for the Northern District of Alabama, sentenced the Petitioner on December 19, 1990. Judge Nelson determined that Petitioner had not accepted responsibility. The sentencing proceedings were transcribed, and the case number was CR-90-N-197. There is no other official or unofficial opinion from the District Court.

The Eleventh Circuit affirmed the district court in an opinion dated May 13, 1992, under case number 91-7055. This opinion was not published.

B. Basis for Jurisdiction

Petitioner's request for review is based upon 28 U.S.C. § 1254(1). Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit dated May 13, 1992.

C. Statement of the Facts

On or about September 12, 1990, a federal grand jury returned a seventeenth count indictment against Gary Wayne Fowler ("Fowler") and numerous other co-defendants. Count One of the indictment charged Fowler with conspiracy to escape custody of the Attorney General of the United States of America, in violation of 10 U.S.C. § 371. Count Two charged Fowler with escape, in violation of 18 U.S.C. § 751. Fowler unconditionally pled guilty to both counts in accordance with the Government's plea agreement. Subsequent to his plea, the Court found that Fowler's Criminal Offense Level was 17, his Criminal History Category was VI, and that he had not accepted responsibility. The Court sentenced Fowler to 63 months imprisonment to run consecutively to any other sentence.

Prior to Petitioner's guilty plea, he cooperated extensively with the U.S. Marshall's office. On page 14 of the government's sentencing memorandum the government states, "Fowler made numerous statements and comments concerning drug activities of his co-conspirator, Dickie Lynn." Additionally, Petitioner attempted on three separate occasions to locate Dickie Lynn for the government with a paging device. Petitioner also attempted to set up a meeting to allow the government an opportunity to apprehend Dickie Lynn.

D. District Court Jurisdiction

The United States District Court for the Northern District of Alabama accepted jurisdiction in the first instance based on 18 U.S.C. § 3231.

E. Basis for Writ of Certiorari

The Eleventh Circuit's decision to uphold the district court's determination that Mr. Fowler had not accepted responsibility was clearly erroneous.

The commentary to the sentencing guidelines sets forth appropriate considerations to be used to determine whether a defendant is entitled to the two-point reduction. The commentary states at notes two and three:

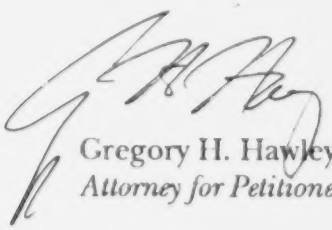
> [T]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse.
>
> U.S.S.G. § 3E1.1 (commentary Note 2).
>
> Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility.
>
> U.S.S.G. § 3E1.1 (commentary Note 3).

In this case, Petitioner did not put the government to its burden of proof and did enter an unconditional guilty plea. In addition, Petitioner cooperated extensively with the federal authorities in their efforts to apprehend Petitioner's co-defendants. These material facts entitle Petitioner to the two-point reduction and, therefore, the Eleventh Circuit's refusal to grant the two-point reduction was clear error.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 27th day of July, 1992, served a copy of the above and foregoing pleading on all parties to this proceeding by placing same in the United States Mail, properly addressed and first class postage prepaid, to:

Mr. Jack Selden
1800 North Fifth Avenue
Birmingham, Alabama 35203

Solicitor General's Office
Department of Justice
Washington, D.C. 20530

Gary Wayne Fowler
99688-131
Post Office Box 1000
Marion, Illinois 52959

OF COUNSEL

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-7055
Non-Argument Calendar

D. C. Docket No. CR90-N-197-E

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GARY WAYNE FOWLER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(May 13, 1992)

Before TJOFLAT, Chief Judge, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

The issue in this appeal is whether the district court misapplied the United States Sentencing Guidelines ("U.S.S.G.") when it denied the appellant's request for a two-level reduction in sentence for "acceptance of responsibility" in accordance with U.S.S.G. § 3E1.1.

Since the record demonstrates that the district court did not misapply the guidelines, we affirm.

The appellant insists that the reduction is due because of his " . . . entry of a plea of guilty prior to the commencement of trial combined with the truthful admission of involvement in the offense, and in light of his, . . . attempts to cooperate with the authorities."

Under U.S.S.G. § 3E1.1, the sentencing court may reduce the offense level by two levels, "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." The district court's decision whether to grant this reduction is entitled to great deference and should not be disturbed unless it is without foundation. U.S.S.G. § 3E1.1, comment. (n.5).

In response to the appellant's argument, the government countered by noting that the appellant (1) had not exhibited conduct manifesting an acceptance of responsibility in a timely way, (2) had not promptly surrendered to authorities after the commission of the offense, and (3) had failed to give a full and truthful account of his involvement in "related conduct."

The record demonstrates that the district court considered the arguments of the parties, weighed those factors presented by the appellant against the contrary evidence offered by the government, and determined that the appellant had not sincerely accepted responsibility. We are persuaded that the district court's ruling was well-founded and should not be disturbed on appeal. *See United States v. Castillo-Valencia,* 917 F.2d 494, 500 (11th Cir. 1990).

Accordingly, we affirm the appellant's sentence.

AFFIRMED.

UNITED STATES DISTRICT COURT
Northern District of Alabama

UNITED STATES OF AMERICA

v. Case Number CR 90-N-197-E

GARY WAYNE FOWLER
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, GARY WAYNE FOWLER, was represented by Jesse Darrell McBrayer.

The defendant pleaded guilty to count(s) One and Two. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense Concluded	Count Number(s)
18 USC 371	Conspiracy to Violate 18 USC 752(a)	04/04/90	1
18 USC 751	Escape	03/27/90	2

As pronounced on December 19, 1990, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count(s) One and Two, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any

change in name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 19th day of Dec., 1990.

/s/ Edwin L. Nelson

United States District Judge

Defendant's SSAN: 259-80-7762
Defendant's Date of Birth: 11/24/51
Defendant's Address: F. C. I., Talladega, AL

Defendant: GARY WAYNE FOWLER
Case Number: CR 90-N-197-E

IMPRISONMENT

The defendant is hereby committed to the custody of the Untied States Bureau of Prisons to be imprisoned for a term of 63 months, said sentence to run consecutive to any sentence that the defendant may currently be serving, or that has previously been imposed.

The defendant is remanded to the custody of the United States Marshall.

Defendant: GARY WAYNE FOWLER
Case Number: CR 90-N-197-E

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term supervised release.
3. The defendant shall not own or possess a firearm or destructive device.
4. The defendant shall pay fine in monthly installments as directed by Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: GARY WAYNE FOWLER
Case Number: CR 90-N-197-E

FINE

The defendant shall pay a fine of $5000.00. This fine includes any costs of incarceration and supervision.

If this fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: GARY WAYNE FOWLER
Case Number: CR 90-N-197-E

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:	
Total Offense Level	17
Criminal History Category:	VI
Imprisonment Range:	51 months to 63 months
Supervised Release Range:	2 to 3 years
Fine Range:	$ 5,000 to $ 50,000
Restitution:	$ N/A

This fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

IN THE DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CR-90-N-197-E
	)	
Plaintiff,	)	Birmingham, Alabama
	)	
vs.	)	November 14, 1990
	)	
GARY WAYNE FOWLER,	)	4:30 P. M.
	)	
Defendant.	)	
----------	)	

TRANSCRIPT OF PLEA
BEFORE HON. EDWIN L. NELSON

APPEARANCES:

FOR THE PLAINTIFF:	HON. WILLIAM SIMPSON Assistant U.S. Attorney 1800 Fifth Avenue North Birmingham, AL 35203
FOR THE DEFENDANT:	HON. JESSE McBRAYER Attorney at Law 605 Dexter Avenue Birmingham, AL 35213
COURT REPORTER:	Penny L. Enoch 325 Federal Courthouse 1729 Fifth Avenue North Birmingham, AL 35203

THE COURT: United States of America versus Gary Wayne Fowler, CR-90-N-197-E. Mr. Fowler, the Court has been informed that you wish to withdraw the plea of not guilty which was previously entered by you and to enter a plea of guilty at this time. Am I correctly informed?

A. Yes, sir.

THE COURT: If you will, please, Mr. Fowler, if you and Mr. McBrayer would come to the podium, please, sir. There are some things that I want to go through with you before we can do that. Mr. Fowler, you are Gary Wayne Fowler?

A. Yes, sir.

THE COURT: Let the record show that Mr. Fowler is accompanied by his attorney, Mr. McBrayer. Mr. Fowler, before I can accept your plea of guilty, there are some things I must tell you , some questions I must put to you, and I must have your answers to my questions under oath. I'll ask the clerk to administer the oath to you at this time.

(Defendant sworn.)

EXAMINATION

BY THE COURT:

Q. Mr. Fowler, you understand that having been placed under oath, your answers to my questions will be subject to penalties for perjury or for making a false statement if you do not answer my questions truthfully?

A. Yes, sir.

Q. Mr. Fowler, how old are you, sir?

A. Thirty-eight.

Q. And in general terms, what is your educational background?

A. Two years of college.

Q. During the past 48 hours, have you had anything to drink, have you taken any drugs, prescription or otherwise, or have you consumed anything at all that might affect your ability to understand these proceedings?

A. No, sir.

Q. It's necessary that you do understand. If at any time we say or do anything that you don't understand or that you're a little bit fuzzy about or have any question about, please let me know so I can explain it in such a way that you will understand it, so that we can give you an opportunity to talk with Mr. McBrayer about it, or take whatever other steps might be necessary to ensure that you understand everything that goes on here today.

A. Yes, sir.

Q. I find that the defendant is competent to enter a plea of guilty to the charges at this time.

Mr. Fowler, as a defendant in a criminal case, you have certain rights. The act of pleading guilty has the effect of waiving or giving up most of those rights—all of them, except one. Before we permit you to waive or give up those rights, we insist on, first of all, explaining them to you, explaining the possible consequences of giving them up; and then we must ensure that if you want to plead guilty, that you do so voluntarily. I propose at this time to advise you of what those rights are.

First of all, you are presumed to be not guilty. You come before the Court with a presumption that you did not do the acts charged against you in the indictment. The government has the burden of proving your guilt by evidence sufficient to convince a jury beyond a reasonable doubt that you committed those acts.

You are entitled to a trial, at which the government would be required to show, if it could, that you had committed the acts, and do so beyond a reasonable doubt. You're entitled to have a jury hear the evidence, to make that decision. Your are entitled to have your attorney with you at trial, to advise with you, consult with you, to represent you, to do those things that you normally would expect an attorney to do. You have the right to have the witnesses for the government to come into open court, to testify in your presence; and then when they finish testifying for the government, could confront or cross-examine those witnesses. Mr. McBrayer, on your behalf, would have the right to examine those witnesses, ask them any ques-

tions which might be relevant to any issue in the case, including questions which might go to show bias on their part, either for the government or against you; evidence which might go to show that there is reason to question the evidence presented by them; to show if it could that the witness might have some reason to testify falsely or to color evidence or withhold evidence, or whatever reason you might have to call into question the reliability of the witness. You would have the right to call witnesses of your own and to use the Court's subpoena power to require those witnesses to come to court. You would have the right to testify yourself if you wanted to testify, but no one could require you to testify; and if you chose not to testify, that could not be used against you and no inference of wrong could be taken from your decision not to testify.

Do you understand the rights I have just explained to you?

A. Yes, sir.

Q. Have you discussed those with Mr. McBrayer?

A. Yes, sir.

Q. If you plead guilty, you waive or give up all of those rights except the right to have Mr. McBrayer represent you. You don't give up the right to counsel. You do give up the presumption that you are not guilty. As a matter of fact, if I accept your plea, the presumption switches and becomes one that you are guilty.

You give up the right to have a jury decide your guilt or innocence. You give up the right to trial, of course; the right to confront and cross-examine witnesses; the right to call your own witnesses. You give up the right to remain silent, because I will ask you some questions about what you did, and then use your answers as part of the things that I consider in determining whether I should accept your plea of guilty.

Do you understand that you're giving up those rights by pleading guilty?

A. Yes, sir.

Q. Do you understand that if I accept your plea that you will be just as guilty as though you had been found guilty after a full trial?

A. Yes, sir.

Q. You would be guilty, the only difference would be the method used to reach that conclusion?

A. Yes, sir.

Q. The only thing left for me to do at that point would be for me to impose a sentence. Do you understand that?

A. Yes, sir.

Q. And knowing all that, do you still want to plead guilty?

A. Yes, sir.

MR. McBRAYER: Your Honor, if you don't mind, in that question, I should make the statement when you're mentioning sentences, make it known to the Court and elaborate on it later that we're going to file an objection to certain parts of the presentence report and the point system.

THE COURT: I understand all that, but —

MR. McBRAYER: I know.

THE COURT: — that's part of the sentencing process. But the only thing left to do once we have a finding of guilt is to impose the sentence. Now, there is a procedure under the Sentencing Guidelines for imposing the sentence and we'll follow that procedure, of course. And the procedure certainly contemplates and affords the defendant an opportunity to be heard on any matter which is relevant to the sentencing guidelines and the imposition of the sentence. You understand that, Mr. Fowler?

A. Yes, sir.

Q. I have before me a document which purports to be an agreement between yourself and the government, purports to bear your signature, dated November 14, 1990. Have you seen that?

A. Yes, sir.

Q. And did you in fact sign it?

A. Yes, sir.

Q. It purports to the bear the signature of your attorney. Do you know if Mr. McBrayer signed it also?

A. Yes, sir.

Q. Have you read the agreement?

A. Yes, sir.
Q. Did you discuss it with Mr. McBrayer?
A. Yes, sir.

MR. McBRAYER: He had one — I'm sorry, but he had one reservation —

THE COURT: Well, let me get to that. I'm going to give you an opportunity.

Mr. McBRAYER: All right.

Q. The plea agreement which is written here, you signed it, and I'm going to give you an opportunity, if you have some problem with it, to tell me what that is. But I understand the agreement to be as follows: That you will plead guilty to Counts 1 and 2 of the indictment; that upon your pleading guilty to those counts, that the government will recommend that you be sentenced to a term of custody for a period of 61 months, that's 5 years and 1 month; that your term imprisonment be followed by a term of supervised release of 3 years.

Further, that you agree to waive your Fifth Amendment privilege against self-incrimination and to provide truthful information concerning the conspiracy and the escape from the institution at Talladega involving yourself and Mr. Lynn; specifically, the escape on March 27, 1990; including, but not limited to, your own role in those offenses; the roles taken by all other persons involved in it that you know about; that you agree to testify at any time requested by the United States in grand jury proceedings, forfeiture proceedings, bond hearings, pretrial hearings, trial, retrials and post-trial hearings; and that you will provide truthful and honest testimony, with no knowing false statement or omissions. That you further agree to take a polygraph test at any time the government may request that you do so, in order to verify the information that you may be providing at that time.

The government agrees that it will advise the Court of the extent of your cooperation or assistance rendered after this time, or before; that you will be given an opportunity to review or be made aware of the facts which the government intends to tell the Court about, and you will be given an opportunity

to try to convince the Court to make a statement of fact favorable to you, as favorable as you can convince the government to do, but that it is the government that is the final judge of what it will say to the Court concerning your cooperation.

You have reserved the right to petition the Court for a sentence different from that which is recommended; that is, the 61 months, and the 3 years supervised release term. The government has reserved the right to advise the Court of all facts and circumstances deemed pertinent to a just and appropriate determination of the sentence.

Now, as I have explained your various agreements, that is, the promises or agreements of the government and your own promises and agreements, are those in fact the agreements as you understand them?

A. Yes, sir.

Q. Is there anything different from what I have stated?

A. No, sir.

Q. Is there anything in addition to what I have stated?

A. No, sir.

Q. This is the entire agreement between yourself and the government?

A. Yes, sir.

Q. The maximum sentence on Count 1—we're going to talk about those charges in just a few minutes, because we want to make certain that you understand the charges and what the government would have to prove before we complete the proceeding—but there are two counts involved here. The maximum sentence to which you would be subject upon a conviction is a term of imprisonment of 5 years on Count 1; a fine of not more than $250,000 on Count 1; a supervised release term of not more than 3 years; I must require you to make restitution, if there is any restitution to be made; and then there is a $50 assessment fee which is mandatory.

Count 2, maximum term of imprisonment is 5 years, and fine of not more than $250,000; supervised release term of not more than 3 years; restitution, again if it's applicable; and a $50 mandatory assessment. Those can be added together in

most cases, in other words, the two 5-year terms of imprisonment could be added together for a total of 10 years; the two maximum fines could be added for a total of $500,000; only one supervised release term would be applicable; the restitution would double up on restitution, if there is any—simply by whatever the restitution is; $50 assessment, or a total of $100 applies to those cases. In other words, the two are added. Do you understand the maximum sentence to which you could be subject upon your conviction?

A. Yes, sir.

Q. I understand that the government and yourself have stipulated that there were no losses to any victim which would be covered or subject to the restitution provisions in the law; is that your understanding also?

A. Yes, sir.

Q. Do you also understand that the United States Sentencing Guidelines are applicable to this case, and the Court is greatly restricted in its discretion to determine a sentence. We simply have to determine what the pertinent facts are, fit those facts into the proper categories or elements within the sentencing guidelines; and the great computer—wherever they have it—spits out a range of sentence, and we're pretty well stuck with that except in unusual circumstances. There are some procedures where we can go outside those guidelines, but those are unusual. Do you understand that your sentence will be governed by the sentencing guidelines?

A. Yes, sir.

Q. Do you understand that the final result of the range provided by those guidelines will be determined by whatever facts I find are applicable to the determination of the guideline range?

A. Yes, sir.

Q. Do you understand that the agreement is between you and the government and the Court is not bound by that agreement?

A. Yes, sir.

Q. You understand that it's not the Court's agreement, it's your agreement?

A. Yes, sir.

Q. It's the government's agreement. And I may, in imposing sentence, completely disregard that recommended sentence if I think that's the appropriate thing to do?

A. Yes, sir.

Q. Do you understand that if I feel that a sentence more severe than that contemplated by your agreement is the appropriate sentence and I impose a more severe sentence, that you would not then be permitted to withdraw your plea of guilty?

A. Yes, sir.

Q. In other words, you would just be stuck with what I decided to do?

A. Yes, sir.

Q. All right, sir. You have discussed this case completely with Mr. McBrayer; is that correct?

A. Yes, sir.

Q. Talked about what the charges are, what the possible defenses are, what your options might be?

A. Yes, sir.

Q. And after discussing with Mr. McBrayer, you've made the decision to do what you're doing here today; is that correct?

A. Yes, sir.

Q. Are you satisfied with Mr. McBrayer's representation?

A. Yes, sir.

Q. Is there any reason that you have for not being satisfied at this time?

A. No, sir.

THE COURT: Mr. McBrayer, you interrupted me a moment ago and suggested there might be some reservation about some part of the agreement. What is that, sir?

MR. McBRAYER: Page 4 under waivers, just so that the first sentence in that paragraph does not conflict with the fact that we are allowed to file an objection to the presentence report, in that it says "by pleading guilty the defendant waives

and agrees" — I don't have to read that, the Court has the copy. Just — Mr. Fowler was concerned —

THE COURT: Well, by its terms, it looks to me like the waiver would apply to motions, defenses, objections, et cetera, that have been made up to this point or which could have been made, or which would be applicable if you were going to trial. I don't read into that any waiver of the right to be heard on sentencing. And if there were any such waiver, I doubt that it would be enforceable.

MR. McBRAYER: It was just —

THE COURT: To be perfectly honest with you, not being faced with it, I don't know — my first reaction to that is, it would be difficult to convince me to enforce such a waiver when we got to the sentencing stage of the proceedings.

MR. McBRAYER: I would imagine the Court, your Honor, would not go along with that, but that is something that —

THE COURT: It does not apply to any — I don't think Mr. Simpson — I noticed him shake his head, I don't think he would contend that it applies to any —

MR. SIMPSON: If the Court would not on the bottom of page 2, we expressly reserved a right on behalf of the defendant to petition the Court from a sentence different than that recommended, or otherwise calculated by the Probation Service.

Q. Mr. Fowler, I think we asked you this, but let me confirm it: Other than what we've talked about to this point, either in going over the plea agreement or anything else we've said, is there any agreement other than what we've talked about today?

A. No, sir.

Q. Any promises or threats made against you to induce you to plead guilty?

A. No, sir.

Q. Are you pleading guilty freely and voluntarily?

A. Yes, sir.

MR. McBRAYER: Mr. Simpson and I did discuss that

question about page 4 in the paragraph, and he did indicate that that was not his intention, whatsoever.

THE COURT: All right, sir.

Q. Do you understand that the plea agreement doesn't purport to limit in any way your right to file post-judgment proceedings?

A. Yes, sir.

Q. Habeas corpus petitions, motions for new trial, motions for set aside pleas, motions under 28 U.S.C. Section 2255; appeals of sentences, if you think that there is some basis to appeal the sentence which was imposed—the agreement doesn't purport to limit your ability to engage in any of that?

A. Yes, sir.

Q. It provides that the plea agreement is null and void if you do anything other than enter a straight guilty plea saying "I am guilty"? If you purport or attempt to plead nolo contendere; or if you come in and suggest "I want to plead guilty under the provisions of *North Carolina versus Alford*"; "I want to plead guilty, but I really didn't do it;" sort of thing — do you understand if you do anything like that, the plea agreement is off?

A. Yes, sir.

Q. If I haven't covered any of it, would someone please point out the part that I haven't covered?

Hearing nothing, I assume that everybody else agrees we have covered the plea agreement.

Mr. Fowler, you were charged in Counts 1 and 2 of the indictment. Count 1 charges a conspiracy. A conspiracy, in general terms, is an agreement between two or more persons to do some act in violation of the law, coupled with some overt or affirmative action done by one of the parties to the agreement which was intended to carry out the agreement. In other words, two people make an agreement to violate the law, and then one of those two persons does something that is aimed toward accomplishing the goal in the agreement. An "overt act" is the way the law puts it.

In this particular case, the indictment charges that beginning in January 1990 and continuing up to about April 4,

1990, in the Northern District of Alabama and in other places, that Gary Wayne Fowler, Richard Joseph Lynn, also known as Dickie Lynn, William Larry Fowler, also known as Larry Fowler, William H. Fowler, also known as Bill Fowler, Sheila Penny and Dorothy Pledger, also known as Dot Pledger, wilfully and knowingly did combine, conspire, confederate, and agree together with each other and with diverse other persons, both known and unknown to the grand jury, to commit the following offenses against the United States: to unlawfully and wilfully escape from the custody of the Attorney General and his authorized representative, having been lawfully committed by virtue of a Judgment and Commitment of a United States District Court, in violation of Title 18, United States Code, Section 751(a) and 2; and 2, to unlawfully, knowingly, and wilfully aid and assist the escape of federal prisoners from the Talladega Federal Correctional Institute, the federal prisoners then being confined in said institution at the direction of the Attorney General by virtue of a Judgment and Commitment of a United States District Court, in violation of Title 18, U.S. Code, Section 752(a) and 2.

That count charges that you and the other persons named there made an agreement, either express or tacit agreement, implied agreement — I doubt that Mr. Simpson contends that you and Mr. Lynn and your father and brother and sister and Mrs. Pledger sat down around a table and someone suggested, "let's make a plan to escape from this place." But an agreement can be implied from the acts of the individuals involved in it; have a tacit or an understood agreement, even though it may never be spoken. So, it's alleged that those of you who are named in Count 1 had an agreement to do two things in violation of the law: One was for you and Mr. Lynn to escape; and second, it was for the other persons to aid and assist you and Mr. Lynn in escaping.

Now, in order for you to be convicted on that count, the government would have to prove the agreement; would have to prove that you wilfully and knowingly did it, that it was an act of your own will; that you knew you were doing it; and that

the goal of the agreement was unlawful in the two things that are alleged here; would also have to prove beyond a reasonable doubt that somebody took some overt or affirmative action to carry out that agreement. Doesn't have to prove you did it, but it must prove that one of those persons named committed an overt act—and I don't remember having read this whether a specific overt act is charged against you—most of have them I see appear to name Bill Fowler and Larry Fowler as taking overt acts. Mr. Simpson, do you recall one that dealt specifically with Gary Fowler?

MR. SIMPSON: If I could have a moment, your Honor.

THE COURT: Well, that's not really necessary. Well, Number 16 alleges that on or about March 27, 1990, while at the shopping center near Oxford, Alabama, Gary Fowler and Dickie Lynn exited the produce truck and did change into other clothing which was provided for them by Bill Fowler. But there are a total of 24 overt or affirmative acts alleged to have been taken in furtherance or to carry out the conspiracy.

It is charged that Bill Fowler and Larry Fowler drove to Rome, Georgia—the area of Rome, Georgia—in the Northern District of Georgia to a location near Ocala, Florida, where they met an individual who is known to the grand jury, and obtained from that person a sum of money which was to be used to finance the plan.

It's alleged that on or about February 20, 1990, Bill Fowler and Larry Fowler traveled to the offices of Commercial Transportation Sales at 835 31st Street North, Birmingham, Alabama, where Bill Fowler purchased a 1983 International truck which was later used during the escape.

The government would not have to prove every one of those overt acts, it would have to prove at least one of them. Now, do you understand the charge made against you in Count 1?

A. Yes, sir.

Q. Do you understand what the government would have to prove in order to convict you of that charge?

A. Yes, sir.

Q. Count 2, a little bit simpler. Charges that on or about the

27th day of March, 1990, within the Northern District of Alabama, the defendant Gary Wayne Fowler, having been lawfully committed on June 24, 1987, to the custody of the Attorney General and his authorized representative, by virtue of a Judgment and Commitment of the United States District Court for the Middle District of Florida, did unlawfully and wilfully escape from custody, in violation of Title 18, U.S. Code, Section 751.

Again, in order to convict you, the government would have to prove beyond a reasonable doubt that somewhere close to March 27—wouldn't have to prove exactly that day, but reasonably close to that day—that you escaped from the Federal Correctional Institution at Talladega; that it was unlawful, that you didn't have the right to leave; that you wilfully, or did it of your own free will; and that you had previously been convicted and sentenced in the United States District Court for the Middle District of Florida.

Escape is probably the simplest crime to prove. I've heard it said that to prove escape, all you have to do is you prove that the prisoner was supposed to be there and then you prove he wasn't; and that's just about all you have to prove.

Do you understand the charge made against you in Count 2?

A. Yes, sir.

Q. I'm going to ask Mr. Simpson to recite what he would expect the evidence to be if we had a trial in this case. I want you to listen to him, because I'll ask you about it when he finishes.

MR. SIMPSON: Your Honor, if it please the Court, if this matter were to proceed to trial, the United States would expect to show as follows: That on or about March 27th, 1990, Gary Wayne Fowler and Richard Joseph Dickie Lynn were incarcerated at Talladega-FCI, serving federal prison sentences after being convicted independently of one another of various theft and drug-related crimes. Fowler was serving 20 years and Lynn was serving life without parole.

Six days before on March 21, 1990, an employee at FCI-Talladega had routinely submitted a purchase order on behalf of the FCI to the Dixie Produce Company, Anniston, Alabama, for the purchase of approximately $1,800 worth of fresh produce. Dixie was to deliver this shipment to the FCI during the morning hours of Tuesday, March 27th.

On March 26th, however, a man later identified as William Larry Fowler, the brother of inmate Gary Fowler, placed a telephone call to a Dixie employee. And, pretending to be a prison employee himself, stated that he was calling Dixie to delay the shipment that was due the next day. As a result of this call, the Dixie employee agreed not to ship the order as originally scheduled.

The next day, March 27, at approximately 8:30 a.m., a white International truck with the words "Dixie Produce" printed on the side arrived at the gate at FCI-Talladega to deliver a load of produce. The driver of the truck, Larry Fowler, who signed in as Hank Penny, 95 Delinger Road, Centre, Alabama, gave the FCI guard a bogus bill of lading which bore a typewritten listing of the produce items that had been ordered previously by the prison officials from the Dixie Produce Company. Larry Fowler then drove the truck into the prison compound into the rear loading dock area adjacent to the prison kitchen where the shipment was unloaded by a number of inmates. Gary Fowler had been assigned to work in the prison kitchen that day.

Approximately 30 minutes later after the produce was off-loaded and the truck was inspected by a guard, Larry Fowler left the FCI property driving the delivery truck, which prison officials believed was then empty of all cargo.

At about 11 o'clock that morning, a Dixie employee called the FCI to ascertain when his company could deliver the load of produce. The FCI employee whom he spoke with advised that the produce had already been delivered by a man purporting to be a Dixie employee.

At this point, prison officials suspected that an escape had occurred. After completing a head count at 2:24 p.m., it was

discovered that Gary Fowler and Dickie Lynn were both missing. Subsequent investigation revealed that Fowler and Lynn entered the cargo area of the truck through a trap door, and concealed themselves in a secret compartment located behind the false wall.

Thereafter, FCI officials turned over to the United States Marshals Service in Birmingham, copies of tape recorded telephone conversations that Gary Fowler had had between February 2nd and March 26th, 1990, with various individuals including his father, William H. Fowler; his brother, Larry Fowler; his sister, Sheila Penny; his father's girlfriend, Dorothy Pledger; and Julia Walker, an acquaintance who lives in the north Dade County area. These telephone recordings revealed plans and events; some specifically stated, and some related in verbal codes which were part of an overall scheme to effectuate the escape of Fowler and Lynn from Talladega.

Your Honor, we would also expect the evidence to show that on or about April 27th, 1990 at approximately 5 p.m. Eastern time, this man was apprehended by a contingent of United States Marshals outside a tavern located on the north perimeter near the city of Atlanta, Georgia; at which point he was then taken back to Talladega.

After going back to Talladega, your Honor, he was put before an administrative hearing officer by the name of William Noonan, whose job it was to determine whether or not this individual would lose his good time credits. We have, your Honor, from the FCI records, a document called a Discipline Hearing Officer Report, or DHO. On page 1 under Roman Numeral II, it has under subparagraph B, Summary of Inmate's Statement to Mr. Noonan. And it says in quotes: "The U.S. Marshal caught me in Atlanta. I admit I escaped in the produce truck with Inmate Lynn. I planned the escape," end quote.

BY THE COURT:

Q. Mr. Fowler, did you in fact escape from Talladega on March 27th?

A. Yes, sir.
Q. And did you do that by crawling through a trap door in the bottom of a produce truck into a hidden compartment?
A. Yes, sir.
Q. Mr. Lynn with you?
A. Yes, sir.
Q. And you had previously been convicted and sentenced to a term of imprisonment, you were serving that term of imprisonment at the time of your escape?
A. Yes, sir.
Q. You had previously planned that escape with your father?
A. Eventually, yes, sir.
Q. I beg your pardon?
A. Well, I mean, you know, when it first started, he wasn't—he didn't know that there was going to be an escape.
Q. But he got into it at some point?
A. Yeah. Yeah.
Q. And your brother, Larry Fowler, was gotten into it?
A. Yes, sir.
Q. At some point. And your sister, Sheila Penny?
A. Right.
Q. Dorothy Pledger, you had telephone conversations with her?
A. No, sir.
Q. You didn't have?
A. No, sir. I mean, I had conversations with her, but nothing about this case.
Q. But there was a plan to escape, you and Mr. Lynn were in on that plan?
A. Yes, sir.
Q. And your brother Larry Fowler was in on that plan?
A. Yes, sir.
Q. And your father Bill Fowler was in on the plan?
A. Yes, sir.
Q. Sheila Penny was in on the plan?
A. Yes, sir.
Q. And what about Dot Pledger?

A. No, sir, not to my knowledge, she wasn't.
Q. All right.
A. She didn't know from me, is what I'm saying.
Q. All right, sir. You don't have personal knowledge?
A. No sir. Right.
Q. The facts as related by Mr. Simpson, particularly with regard to how the escape was planned and carried out, are those facts essentially correct?
A. Yes, sir.
Q. Is that essentially what happened?
A. Yes, sir.
Q. You have told me that you understand the rights that you have and that you're waiving those rights?
A. Yes, sir.
Q. Told me that that's what you wanted to do?
A. Yes, sir.
Q. We've explained what the charges are, and you've indicated that you understand what those charges are?
A. Yes, sir.
Q. We've explained the maximum sentence to which you may be subject, and you said you understood that?
A. Yes, sir.
Q. You've heard the facts as related by Mr. Simpson, you and I have talked a little bit about them. Putting the charge and the facts together, are you in fact guilty of the two charges made against you?
A. Yes, sir.
Q. Are you guilty of the conspiracy count?
A. Yes, sir.
Q. And are you guilty of the escape?
A. Yes, sir.
Q. Do you still want to plead guilty?
A. Yes, sir.

THE COURT: Mr. Simpson, have I covered everything?
MR. SIMPSON: Yes, your Honor, I believe you have.
THE COURT: Mr. McBrayer?
MR. McBRAYER: There was one statement about Mr.

Noonan that was mentioned that I think Gary said he was not at the hearing.

A. I refused to go to the hearing, and the statement he made that I made a statement that I did plan all that is false, because I refused to go to the hearing.

Q. All right. You disagree with that?

A. That part, yes.

Q. All right. But you do admit that you escaped?

A. Yes, sir, I did.

Q. Whether you admitted it to him, you admit it to me?

A. Yes, sir.

Q. And you admit there was a conspiracy?

A. Yes, sir.

Q. And you were part of it?

A. Yes, sir.

Q. And the conspiracy was for you and Mr. Lynn to escape?

A. Yes, sir.

THE COURT: Either of you know of any reason why I ought not to accept Mr. Fowler's plea of guilty?

MR. SIMPSON: No, your Honor.

Mr. McBRAYER: No, sir.

Q. Mr. Fowler, do you know of any reason I ought not to accept your plea?

A. No, sir.

Q. All right. I will accept your plea, and I find that your plea of guilty is freely, voluntarily, knowingly and understandingly offered, and the requisite factual basis for the plea doe sexist; the plea of guilty is accepted, and the defendants is adjudged guilty as charged in Counts 1 and 2 of the indictment.

Sentencing will be set at 8:30 a.m. on February 15, 1991. I direct that the plea agreement be filed and made a part of the record in this case.

MR. SIMPSON: Thank you, your Honor.

THE COURT: Anything else from the government?

MR. SIMPSON: No, your Honor.

MR. McBRAYER: Your Honor, there is something the defendant would like to know, if possible. He has some per-

sonal items that are under the control of the government or specifically, the U.S. Marshals, or whatever agency. They are personal items that are not needed in the trial of the remaining defendant, he would like to have them returned so he can—

THE COURT: Why don't you try to work that out with Mr. Simpson? What's the nature of the personal items you're talking about?

MR. McBRAYER: Clothing, and some pictures and some documents concerning some previous activities of the defendant not related at all with this case.

THE COURT: Why don't you talk to Mr. Simpson and see if you can work it out?

MR. SIMPSON: Your Honor, we have previously discussed this yesterday afternoon at 4:10 p.m. I advised Mr. McBrayer to advise his client that I would—at this point, anyway—not be willing to give up anything which the government deems of evidentiary value against any defendants, either indicted now or indicted later. But that if there was anything that I did not think was of any kind of evidentiary value whatsoever, I would certainly make that available.

THE COURT: I assume there's nothing there that's contraband, presumably Mr. Fowler would eventually get all that back.

MR. SIMPSON: Yes, sir.

THE COURT: It may be later, instead of sooner.

MR. SIMPSON: Yes, sir. Well, where Mr. Fowler is next going, I don't think he's going to be given any personal effects anyway.

MR. McBRAYER: Well —

THE COURT: Well, I'm not sure what that means.

MR. SIMPSON: He's going to Marion, your Honor.

MR. McBRAYER: Well, Mr. Fowler's concern is and the Court will recognize it, as we all have been involved in this case, is that essentially all members of Mr. Fowler's family are involved in this matter. And his interest in getting the personal items back are to direct them into someone's control,

and that's why the question is being brought up right now. That's essentially all he has, and he's wanting someone to gain control of these items so he can have them directed.

THE COURT: Well, as we say, I think that assuming there is no contraband there, that eventually they can go back to their rightful owner. I don't know of anything that permits the government to simply take someone's property, unless it's contraband; or perhaps under some forfeiture statutes, but no one has indicated to me that any of those apply in this case.

MR. McBRAYER: I did have the conversation with Mr. Fowler subject to Mr. Simpson's conversations, and do understand that, and have told Mr. Fowler that they cannot keep them and he's aware of that. He's just, in this special circumstance, feels that if there can be some speed to the return, that he would appreciate it due to the situation.

THE COURT: Well, I don't think the Court can order the return of those at this point. You know, there's always a Rule 41 motion for return of seized property which puts the Court in a position to consider the circumstances of the taking, what the property is, why the government requires or thinks it requires possession of those things. There is a formal proceeding for doing that sort of thing, and that's the way we have to insist that you do it. Otherwise, it sort of puts me in a position of running the prosecution side.

MR. McBRAYER: We recognize that.

THE COURT: And I have trouble running my side, I don't try to run anybody else's.

MR. McBRAYER: We recognize that, your Honor, but it was something that wanted to be mentioned at this point.

THE COURT: Mr. Simpson is aware of it. I would assume that at some point, when those things can be released, that they will be released.

MR. SIMPSON: Yes, your Honor.

THE COURT: Do you anticipate holding these items of personal property until after Mr. Lynn has been tried?

MR. SIMPSON: Yes, your Honor, because there are still other people out there that have yet to be indicted.

THE COURT: All right. Mr. Fowler will be remanded to the custody of the marshal. We are adjourned.

CERTIFICATE

"I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled manner.

/s/ Penny L. Enoch
Penny L. Enoch

November 29, 1990
Date

IN THE DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CR-90-N-197-E
	)	
Plaintiff,	)	Birmingham, Alabama
	)	
vs.	)	December 19, 1990
	)	
GARY WAYNE FOWLER,	)	8:30 A. M.
	)	
Defendant.	)	
----------	)	

TRANSCRIPT OF SENTENCING
BEFORE HON. EDWIN L. NELSON

APPEARANCES:

FOR THE PLAINTIFF:	HON. WILLIAM SIMPSON Assistant U.S. Attorney 1800 Fifth Avenue North Birmingham, AL 35203
FOR THE DEFENDANT:	HON. J. DARRELL McBRAYER Attorney at Law 605 Dexter Avenue Birmingham, AL 35213
COURT REPORTER:	Penny L. Enoch 325 Federal Courthouse 1729 Fifth Avenue North Birmingham, AL 35203

THE COURT: Case is United States of America versus Gary Wayne Fowler, CR-90-N-197-E. Mr. Fowler, if you and Mr. McBrayer would come to the podium, please, sir.

We are here for the purpose of imposing sentence after your conviction on the plea of guilty earlier on. The record should show that Mr. Fowler is present with his attorney. I have examined the presentence report in this case, and I have examined certain objections filed by the defendant. How do you wish to take that up, Mr. McBrayer? Do you wish to argue those, or what do you wish to present on those?

MR. McBRAYER: Your Honor, I think perhaps just some brief —

THE COURT: All right, sir.

MR. McBRAYER: Excuse me for a minute, I was thinking as I was speaking there. Some brief argument might —

THE COURT: First off, have you had at least 10 days to examine the presentence report?

MR. McBRAYER: Yes, we have, your Honor.

THE COURT: All right. Go ahead.

MR. McBRAYER: Let me get the — as you say, go ahead as to the presentence report objection you're speaking of.

THE COURT: Yes, sir.

MR. McBRAYER: Just to point out that in addition to the points of the acceptance on page 2, the adjustment for acceptance of responsibility, we wish to point out to the Court that Mr. Fowler at present still is willing to cooperate with the government in any way possible, even to the point of still making the statement that he will take a polygraph test. His only reservations in that area was perhaps some knowledge that he has that might be misconstrued in a yes-and-no situation as to one particular co-defendant, but that's another point as further evidence of his cooperation present.

And, of course, there is evidence and documents that his extensive cooperation in Atlanta for coming here also.

THE COURT: What has he done to—and I'm quoting—"clearly demonstrate a recognition and affirmative accep-

tance of personal responsibility for his criminal conduct"? Tell me what he's done in that regard, sir.

MR. McBRAYER: In the documents that have been before the Court specific to before he got here, he helped out—it's in the sentencing memorandum, the last few pages—I think the last three pages speak to his cooperation with the government in Atlanta before coming.

THE COURT: Up to a point.

MR. McBRAYER: Up to a point, of which he was advised to no longer say anything. And then came over here and has made some statements as far as the offense itself and his activities in the offense. He did enter an agreement and said he would cooperate and has continued to say he would and provide information. The only stumbling that might be looked at was in reference to or in regard to a polygraph test that was asked for him to take. And I had said at that time, and I'd still say the same thing, that there was a reservation as to one defendant. He is open to anything that the U.S. Attorney's Office or the marshals wish to ask him and cooperate in every way.

THE COURT: I'm not sure I understand. Does he want to take a polygraph test now?

MR. McBRAYER: Yes, sir.

THE COURT: When did he agree to do that?

MR. McBRAYER: He just told me — well, he has continued to agree to take a polygraph.

THE COURT: When did he originally agree to take a polygraph test? When was he willing to take the test and say "I'll tell you whatever you want to know that I know about this incident"?

MR. McBRAYER: From the day that the agreement was signed as to his plea.

THE COURT: He was willing to talk fully and openly about Dot Pledger?

MR. McBRAYER: As to his —

THE COURT: Let's just put the hay down where the goats can get it. You're talking about Dot Pledger.

MR. McBRAYER: Right. If you want the hay down where the goats are —

THE COURT: Well, I'm not — I'm tall, but I need it simple.

MR. McBRAYER: In simple terms, he has knowledge. All right. He has knowledge that was gained after a certain point in time. What Mr. Fowler is saying is that during recorded conversations which are referenced in part in the sentence memorandum, he did have conversations with Dot Pledger. He did speak to her in — about certain information in reference to things that were going on.

There are certain timeframes through here in which at one point a co-defendant was considering this to be a part of a retirement plan at one point, then it became a part of the conspiracy. His knowledge is as to Dot Pledger that he was passing perhaps information through Dot Pledger without her knowledge of what was going on. He did not know at what point she may have had some knowledge from a different source as to what's going on. He's willing to say what he knows about her participation, if he does know that, or —

THE COURT: He wasn't willing to say it, and he stood — the day he entered his plea of guilty, he stood right there and if he didn't lie to me, he at least was reluctant to talk about Dot Pledger.

MR. McBRAYER: Well, it was —

THE COURT: Having taken an oath not 15 minutes before to tell me the truth.

MR. McBRAYER: I cannot remember verbatim that day, but from talking with Mr. Fowler, in my conversation with Mr. Fowler, his mental processes or his theme has continued from day one; and that is, that he will be glad to speak about any parties in here extensively as to any co-defendants. His only reservation is that at what point in time did he gain knowledge of Dot Pledger's activities. It's just a fact that at some point in time when he's having conversations with Mrs. Pledger, he was not aware at that point of her involvement—if proven that she was deeply involved. I'm not trying to make statements to im-

plicate Dot Pledger, because I'm not her attorney, I don't know what her activity was or was not, other than what I have gained.

THE COURT: I don't know what it was either, a jury is about to tell us some time in the next few weeks.

MR. McBRAYER: Precisely. But Mr. Fowler says, according to what he has been told, there is indications that she may have been involved. But at the point he was having conversations with her, he had no knowledge at that point that she did know or did not know.

THE COURT: Let me hear —

MR. McBRAYER: But he's willing to say what he can.

THE COURT: — let me hear from Mr. Simpson on the question of acceptance of responsibility.

MR. SIMPSON: Your Honor, if it please the Court, the government has spoken to that issue heretofore filed with the Court in writing, beginning on page —

THE COURT: Well, I have seen —

MR. SIMPSON: — page 4.

THE COURT: — the memorandum. I just wonder whether you've got anything you want to say in response to what we've heard this morning.

MR. SIMPSON: Your Honor, in the many months that I've worked this case and the many people I've talked to concerning this defendant, it appears the bottom line is this man is extremely manipulative, and he has gone through life manipulating people any which way he can to his advantage.

In support of that statement, your Honor, I would submit to the Court, as I have in writing, that this man manipulated most of his family in order to get out of prison this time. He has attempted to manipulate the marshals over in Atlanta when he held the carrot out to them, if you will, with respect to Dickie Lynn. And at the last minute, talking to his former lawyer behind his other lawyer's back. He was then represented by a woman named Hasheeme. And yet he contacted a former lawyer, who at the time was representing his wife, who—behind Hasheeme's back—told this man, I've talk to the

government, the government is not willing to do what you want. Shut up." Which is what he did. So, the manipulative effort failed.

He then came over here, and through our extensive plea negotiations, he attempted to manipulate the government, at which point I just put my foot down and told counsel, "I'm not going to be manipulated."

So, he has certainly not accepted responsibility. If he can't get anything out of it, he's just not going to do it. The only person—and he knows this—the only person who the government has any real interest in at this time that was part of the conspiracy was Dot Pledger. He is willing to talk about anyone who has heretofore pled guilty, but refuses to make any statement against the interest of Dot Pledger, even though the government gave him an opportunity to recant that at the time we interviewed him by playing a number of audio tapes, which I have outlined in my sentencing memorandum. We put the transcript of the tapes in front of him so he could read it. And after playing—I believe we played two tapes—I asked him, "Does that refresh your recollection?" He said, "Well, I remember the conversation, but I didn't know she was involved", which runs contrary to the very conversations themselves.

THE COURT: Anything else you want to say on that point, Mr. McBrayer?

MR. McBRAYER: As far as the conversations with Mrs. Pledger —

THE COURT: Well, on acceptance of responsibility.

MR. McBRAYER: In acceptance, then, to go beyond Mrs. Pledger just further — well, the objection states the fact that there is no entry for obstruction of justice and the implications of that.

THE COURT: Your position is that he ought to be charged with obstruction of justice, or in the alternative — if he's not charged with obstruction, he ought to get acceptance of responsibility?

MR. McBRAYER: My statement is that the sentencing

guidelines says that if there's no entry in obstruction for justice, any level enhancement, then that is an indication — and I think I quoted that section on page 2.

THE COURT: Well, I think you're reading it upside down. It says that if he's charged with obstruction of justice, that's an indication that he probably ought not to also get acceptance of responsibility. The two are inconsistent. Doesn't necessarily mean that if you don't charge him with obstruction of justice, it follows that he ought to get credit for acceptance of responsibility.

MR. McBRAYER: Well, I had just read the commentary.

THE COURT: Well, that's what I was looking at.

MR. McBRAYER: Indicates that the defendant — and I did not find anything further in the commentaries, but I thought that was an interesting point as far as acceptance of responsibility not within that specific section as to acceptance.

THE COURT: There are some factors that are suggested in the commentaries to look at when you're talking about acceptance of responsibility: Voluntary termination or withdrawal from criminal conduct or associations. Did Mr. Fowler call the FBI and say, "Here I am, come get me"?, or "Where can I turn myself in, I want to voluntarily withdraw from this escape status that I'm on"?

MR. McBRAYER: I think that —

THE COURT: Or was he arrested in or outside a bar in Marietta or some place over in Georgia?

MR. McBRAYER: Specific answer, no, he did not turn himself in; and yes, he was arrested outside of a bar. But as I had read that section, I believe there's seven, or (a) through (g) that may be considered.

THE COURT: I'm about to go through them. That was my first question. I know there's no restitution that I'm aware of.

Voluntary and truthful admission to authorities of involvement in the offense and related conduct. Apparently he's still not willing to tell everything you say he is, but even when he was pleading guilty, he was dancing around left and right,

back and forth every time we mentioned Dot Pledger.

MR. McBRAYER: I, of course, will have to disagree and affirm the statements made earlier as to why. And it may have seemed he was bouncing back and forth, and then restate again that he is willing to cooperate.

THE COURT: Let's talk about timeliness of his conduct in manifesting acceptance of responsibility. Before everybody else except Dot Pledger and Dickie Lynn pled guilty, did he say to Mr. Simpson, "Let me tell you everything I know about this"? Or did he wait until everybody else pled guilty and said we're going to come in and testify against him and tell the Court what he did, was it at that point that he decided he ought to come clean?

MR. McBRAYER: Specific answer again, I would say that his agreement or agreement to make a plea agreement came after a number of people already had signed those, but that is of no consequence as far as dealing — timeliness is an element, and it speaks to timeliness. It can be considered. But, you know, that's another — something that can be looked at or considered.

I saw nowhere in there that you are to be specifically—I don't want to the lose my word—harmed, is the only thing that come to mind, or punished for waiting any length of time to make your agreement. Your mental processes continue, and at a certain point, you may make a decision as in any give and take in bargaining with any situation that you've in with the criminal activity and bargaining with the government.

THE COURT: Well, let's move on to something else. I specifically find that the defendant has not clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct, and I specifically decline to give him credit or a reduction for acceptance of responsibility. What else do you want to talk about, sir?

MR. McBRAYER: Just the other information that — just flip through here, the objection at page 3. We put the information in there as requested by the defendant, because he feels that there is a misstatement or a lack of —

THE COURT: Didn't escape, he was on bond. All right. I don't know whether he escaped or whether he was on bond. It doesn't bother me, I don't take it into account. Didn't happen.

MR. McBRAYER: Of course, the guidelines provisions of the objection are as stated, and that's — I will make one point and go back to the first page as far as adjustment in the role. I would further point out that we're asking for (c), 3B1.1(c), but further stated — would like to make the statement that even if he were — to be shown that there were five people or more, he would still fall in category (c), the way I understand it.

THE COURT: You suggest there weren't five people involved? I can name five, six. I can name Dickie Lynn, I can name him, I can name his father, that's three; I can name his brother, that's four; I can name his sister, that's five. He got the people who modified the truck for him; got the people who — you know, the guidelines say everybody they involve can be brought in as a participant — considered as a participant. But probably if you really look at it, you got a dozen or more.

MR. McBRAYER: Yes, sir, I understand the guidelines do say, it's almost an ancillary term. Those people that involve other people and other people on down the line can —

THE COURT: What about the people over at Dixie Produce? What about the people at FCI-Talladega? He brought them into it. Not knowingly. They weren't knowing — I assume the people at Dixie Produce weren't knowing participants. People who printed the phony invoices, I assume were not knowing participants.

MR. McBRAYER: If we were to look to the individuals which have been brought into — directly brought in and identified as participants, have made the agreement, plea agreement — then there are less than five that go beyond the actual number of people. We would still say he falls into (c), because of him not being organizer and leader.

THE COURT: Who recruited Bill Fowler to get involved

in this process? Dickie Lynn do that, or did Gary Fowler do that?

MR. McBRAYER: Well, the fact of the involvement of Mr. Fowler, Bill Fowler, there still remains the absolute fact which is evident to everyone that there's an extensive development of a project.

THE COURT: Answer my question: Who recruited Bill Fowler?

MR. McBRAYER: Gary Fowler.

THE COURT: Well, who recruited Larry Fowler?

MR. McBRAYER: Now, we may —

THE COURT: Who recruited Sheila Penny?

MR. McBRAYER: That may be — may have been a joint recruitment, or it may have been an individual that was outside that's recruiting others into it.

THE COURT: Bill Fowler?

MR. McBRAYER: It may have been —

THE COURT: You got to get that hay down where we goats can get to it. You're talking about —

MR. McBRAYER: I'm trying to remember exactly who would be the specific person outside. I don't wish to represent anything that's not true. What I'm saying is that—

THE COURT: Who was telling Bill Fowler how this plan was supposed to operate, who was giving him instructions?

MR. McBRAYER: I believe some of the information in this was coming from Talladega, either from Dickie Lynn or Gary Fowler or from Gary Fowler. There's some indications—

THE COURT: Mr. Simpson, have you got any telephone calls on tape from Dickie Lynn to Pledger or Fowler or anybody involved in this scheme?

MR. SIMPSON: No, your Honor.

THE COURT: Have you got telephone calls giving instructions from anybody, except this man, to people outside about how to carry out this plan?

MR. SIMPSON: No, your Honor. We do nave approximately one hundred calls from this man to his family members.

THE COURT: During the period, the weeks immediately preceding the escape?

MR. SIMPSON: Approximately two and half months.

MR. McBRAYER: Within those tapes, there are some statements as to "let me check with" — I forgot the name, but he referred to the person — "let me check with someone to see if that's okay."

THE COURT: Organizer and leader, from your standpoint, would include only the top man. If we assume that Dickie Lynn is the top, the organizer would be Dickie Lynn and nobody below him?

MR. McBRAYER: As I understand the Sentencing Guidelines, there can be multiple people that fit within — in a certain category.

THE COURT: That's what I understood, too.

MR. McBRAYER: What I'm saying is that there's a designation of manager in that section; and (c), specifically it says if it doesn't fit into (a) and (b). As a manager, there's no way that this individual could have bought trucks, cars, negotiated fifty to a hundred thousand dollars, had manufactured magnetic signs, had invoices printed up.

THE COURT: You're talking about organizer. What about leader? Says if he was an organizer or a leader.

MR. McBRAYER: Well, that's what we're saying, manager or supervisor.

THE COURT: Well, I'm looking at the guidelines. It says "organizer or leader." "Or," that's in the disjunctive.

MR. McBRAYER: Precisely. And there's no indication other than the conversations that one can construe that he may be a leader, but there's also information that says he has to check with someone else to see if it was okay. Plus the funds to fund this thing had to come a particular source. He—

THE COURT: A platoon sergeant who has to check with the lieutenant. Is the platoon sergeant a leader of that platoon, or is the leader limited to the lieutenant?

MR. McBRAYER: No, that's almost like semantics.

THE COURT: No, we're not, we're talking about lead-

ers. We're talking about a lieutenant who commands a platoon, we're talking about a platoon sergeant who also leads that platoon. What about the squad leader?

MR. McBRAYER: This is true, but—

THE COURT: Army is still organized into squads and platoons and companies and battalions.

MR. McBRAYER: You also have a president of—

THE COURT: I was a sailor, I'm not supposed to know about that.

MR. McBRAYER: You also have a president of a bank and you have the manager of the bank. Is the manager the leader? I'm not trying to be flippant, but there's a designation of who is a manager and who is a supervisor — who is the supervisor of a plant, although he is the leader of the individuals.

THE COURT: Mr. McBrayer, if I were to find that Mr. Gary Fowler was anything less than a leader in this plan, I would deservedly be laughed out of this courthouse. The simple fact is that he may not have been at the top—and I don't really know what Dickie Lynn's part in this is. Dickie Lynn may not be convicted, maybe he just — I don't know. He hasn't had a trial yet. He is presumed to be not guilty. I don't know what his role was, but I am convinced that this man at least had a leadership role in this.

MR. McBRAYER: Yes, sir.

THE COURT: And I'm going to treat him as though he had a leadership role, and I specifically find that he was a leader; that it involved five or more participants. And on that basis, I am going to increase the Criminal Offense Level by 4 under 3B1.1(a).

MR. McBRAYER: Yes, sir.

THE COURT: Something else?

MR. McBRAYER: We would, of course, stand on our —

THE COURT: All right, sir.

MR. McBRAYER: — objection to the presentence report. We would request — could I have one moment?

THE COURT: Sure.

MR. McBRAYER: Well, then, I can only state at this point, your Honor, that since you do not see the acceptance which we feel there is extensive evidence and you do see the 4, we would only request that we receive the range of the guidelines which are given in the United States Sentencing Guideline book and take the lower end of the range.

THE COURT: Let me ask you specifically, Mr. Fowler, you have examined the presentence report?

A. Yes, sir.

THE COURT: Other than what you have said through your attorney, is there anything in it that's incorrect or that you think needs to be explained or any comment about what's in the presentence report?

A. No, sir.

THE COURT: Other than the two matters—we didn't talk about the sawblades in the shoes—but that's in your written objections. And I note, by the way, that the written objections say you were never charged or convicted with anything in connection with that, but you didn't deny that it happened. And I think my question is, did you — I have forgotten who delivered those shoes with the sawblades.

MR. SIMPSON: Debbie Savage, your Honor.

THE COURT: Were they, in fact, delivered?

MR. McBRAYER: Your Honor, this is my —

THE COURT: Statute of limitations. I'm sure, has run on any criminal activity in there.

MR. McBRAYER: Right. We do — it's my — in making this statement when we were in that particular section — but we do have letters and so does the government on that particular note, I believe 43, where the individual that did escape wrote a letter to Mr. Fowler's attorney and to—I can't recall—perhaps the FBI, that Gary Fowler did not know the hacksaws were in these shoes and that he was the one that was responsible for it.

THE COURT: All right.

MR. McBRAYER: And there is a note from the —

THE COURT: I'll disregard that, pretend it didn't hap-

pen. If it did, it didn't now, at least for this proceeding. I don't pretend to bind anybody else.

Let me ask you specifically, at age 18; September 24, 1970, the defendant Gary Fowler convicted in the Superior Court of Floyd County, Rome, Georgia, five courts of forgery? Is that correct, paragraph 36?

A. I don't think the date could be possible, because I was in the service until January '71. I think the dates on those are really — the dates are not even close on most of them.

THE COURT: Notwithstanding the date, were you in fact convicted?

A. Yes, sir.

THE COURT: Is the other information correct? Forged a series of five payroll checks?

A. Yes, sir. Yes, sir.

THE COURT: When did that happen, and what was your age?

A. Probably what it is, is probably like 9/24/71 instead of '70, that's probably —

THE COURT: Oscar, does the date change anything?

PROBATION OFFICER: Your Honor, it possibly could in terms of whether the points could count or not within the 15-year period, he had been incarcerated within 15 years of the date of this offense. However, Judge, we verified this—or our counterparts in Georgia verified this—and absent anything to the contrary, we would stand on what's printed here with the dates.

THE COURT: What about 6/30/72, paragraph 37; theft by taking, theft by receiving, in the Superior Court of Floyd County, Georgia; plea of guilty, five years, serve one year and the rest on probation; is that correct?

A. Yes, sir.

THE COURT: That first conviction of those five forgery counts, you had an attorney Grady Morris?

A. Yes, sir.

THE COURT: And the second one, theft by taking and theft by receiving, you had an attorney Rex Garner?

A. Yes, sir.

THE COURT: Look at paragraph number 38, 6/30/72, same date: Forgery in the first degree, Rex Garner; and is that information correct?

A. No, sir. I believe that is a probation violation from the first one.

THE COURT: Well, the first one, paragraph 36 says your probation was revoked on 6/30/72.

A. That's the same one, sir.

THE COURT: Now, the information says that there was an indictment in that case; said that Gary Wayne Fowler altered a draft for payment in the amount of $50 to Rusty Barrons and presented same to the City Bank of Rome, Georgia, on May 5, 1972. If that's correct, that could not refer to a probation revocation from that first conviction.

PROBATION OFFICER: Judge, that's a separate offense.

THE COURT: It looks to me like it's a separate offense. What about October 17, 1973, theft from interstate shipment, two counts, U. S. District Court in Atlanta; you were represented by Charles Flinn, an attorney?

A. Yes, sir.

THE COURT: And is that information that's contained under paragraph 30 correct?

MR. McBRAYER: Paragraph 39?

THE COURT: 39, I beg your pardon.

A. Yes, sir.

THE COURT: Look at paragraph 40, August 2nd, 1976; conviction for child abandonment in Superior Court of Floyd County, Georgia. Is that information correct?

A. Yes, sir.

THE COURT: You were represented by Harvey Brown, an attorney?

A. Yes, sir.

THE COURT: Paragraph 41, conspiracy to commit theft from interstate shipment, U. S. District Court at Rome, Georgia, where you were represented by an attorney Dan Byars. Is

that information contained in that paragraph correct?

A. Yes, sir.

THE COURT: Paragraph 42, January 17, 1984, kidnapping, three counts; theft of motor vehicle; possession of firearm during commission of a crime; aggravated assault; all in Superior Court, Floyd County, Georgia. You were represented by an attorney Harl Duffey, Jr.?

A. Yes, sir.

THE COURT: Is the information contained in paragraph 42 correct?

A. Except for the sentence imposed.

THE COURT: What sentence did you receive?

A. I pled guilty to one count of false imprisonment and received a 12-year sentence.

THE COURT: Say you pled guilty to what?

A. One count of false imprisonment instead of kidnapping.

THE COURT: What was the sentence?

A. 12 years to run concurrent with the Federal sentence.

THE COURT: Otherwise it is correct?

A. Yes, sir.

THE COURT: The original charge included those —

A. Yes, sir.

THE COURT: — charges that I had listed earlier? I asked you if that's correct. The last paragraph in that section says that on 6/9/84 that you escaped from Floyd County and you were rearrested in Norcross, Georgia. That's not what we referred to earlier, is it?

A. Yes, sir. Yes, sir.

THE COURT: Paragraph 43, 1/16/85, unlawful receipt of a firearm and ammunition shipped in interstate commerce; possession of cocaine with intent to distribute, U. S. District Court in Atlanta, represented by attorney Steven Sadow; is that correct?

A. Yes, sir.

THE COURT: Paragraph 44, January 5, 1987, conspiracy to steal from interstate shipment, U.S. District Court in Jacksonville.

MR. McBRAYER: Your Honor —

THE COURT: You had an attorney named Brent S. Shore?

MR. McBRAYER: — excuse me for interrupting, but the previous 43 was also in the objection to the presentence report as to the escape of the shoes.

THE COURT: All right. Did you have an attorney and trial — a case down in the District Court in Jacksonville, Florida; Brent S. Shore?

A. Yes, sir.

THE COURT: Information in paragraph 44 also correct?

A. Yes, sir.

THE COURT: I think we've covered all the criminal convictions listed in the presentence report. Before I impose the sentence, is there anything you would like to say to me either in mitigation of punishment or otherwise? I'll be glad to hear from Mr. McBrayer, or Mr. Fowler personally, or from both of you.

MR. McBRAYER: Mr. Fowler has decided not to make a statement, but wishes for me to make a statement at the appropriate time.

THE COURT: Well, this is the time, sir.

MR. McBRAYER: Okay. On Mr. Fowler's behalf, I would state that he is willing to cooperate with the government and wishes to continue to do so, that he has from the day of his being brought into Atlanta; and would ask the Court, based on his willingness to cooperate to every extent, to consider this in imposing the sentence in this particular case and would ask for a low end, if we're in the guideline range use of the sentence, which I think is 51 months in the category without acceptance of responsibility.

THE COURT: All right, sir. Anything else?

MR. McBRAYER: Not at this moment, your Honor.

THE COURT: Mr. Simpson?

MR. SIMPSON: Nothing, your Honor, thank you.

THE COURT: Is there any reason the sentence ought not to be imposed at this time?

MR. McBRAYER: No, sir.

MR. SIMPSON: No, sir.

THE COURT: Other than as stated, particularly the two incidents objected to by the defendant regarding the escape and the sawblades, I find that the factual statements contained in the presentence report are correct and that they are the facts as they apply to the sentencing process in this case.

I specifically find that the Criminal Offense Level is 17, the Criminal History Category is VI; the guideline imprisonment range is from 51 to 63 months; the fine range is from 5,000 to $50,000; the guideline term of supervised release is at least 2 years but not more than 3 years; restitution is not applicable. I find no reason to depart from the sentence called for by application of the guidelines, inasmuch as the facts as found are the kind contemplated by the Sentencing Commission.

Now pursuant to the Sentencing Reform Act of 1984, it is the judgment and sentence of the Court that the defendant Gary Wayne Fowler be sentenced to the custody of the Bureau of Prisons for 63 months, said sentence to run consecutively to any other sentence which the defendant may be serving at this time, or which he may have to serve which has already been imposed. It's further ordered that the defendant pay a fine in the amount of $5,000. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years. While on supervised release, the defendant shall not commit another federal, state or local crime; shall comply with the standard conditions that have been adopted by this court, and shall comply with the following conditions: One, that the defendant will make monthly payments on an installment basis on his $5,000 fine on a plan approved by the U.S. Probation Office. I do not impose costs for incarceration or supervised release due to the defendant's lack of assets, making it unlikely that he would be able to pay more than that amount which has been imposed as a fine. I do impose an assessment fee of $50 on each count.

Mr. Fowler, you have a right to appeal the sentence imposed within 10 days if you believe that the guidelines have been misapplied or that the sentence is otherwise in violation of law. Do you understand your right to appeal?

A. Yes, sir.

THE COURT: If you want to appeal, then Mr. McBrayer will assist you in perfecting that appeal, sir.

Is there any objection from any party as to the findings of fact, the calculations, the sentence, or the manner in which the sentence was pronounced or imposed, other than those objections which have previously been stated for the record?

MR. SIMPSON: None from the government.

THE COURT: Any from the defendant?

MR. McBRAYER: No, sir.

THE COURT: For the record, I have chosen to impose a sentence at the top of the guideline range, and I have done that for the reason that my examination of the presentence report has convinced me that Mr. Fowler is either unwilling or unable to live outside prison as a law-abiding citizen. That being the case, it's my view that to impose a sentence at the top of the range will—at least, we hope—have some small effect of impressing upon Mr. Fowler and those like him who apparently cannot or will not live as law-abiding citizens, that if you choose to live your life that way, there is a price that has to be paid, and it's the maximum price.

With regard to Mr. Fowler's repeated statements that he's willing to cooperate, I might remind him of provisions of Rule 35(b). If you really want to cooperate and can convince Mr. Simpson that you have done so in a manner and to a degree which would justify a motion under 35(b), then that's between you and Mr. Simpson. Anything else before we complete this proceeding?

MR. SIMPSON: Nothing. Thank you, your Honor.

THE COURT: Anything else from the defendant?

MR. McBRAYER: No, sir.

THE COURT: You understand your sentence, Mr. Fowler?

A. Yes, sir.

THE COURT: You'll be remanded to the custody of the United States Marshal.

MR. McBRAYER: Thank you, your Honor.

THE COURT: Thank you.

CERTIFICATE

"I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled manner.

/s/ Penny L. Enoch
Penny L. Enoch

December 20, 1990
Date